

1 ANDRÉ BIROTTE JR.  
 United States Attorney  
 2 CHRISTINE C. EWELL  
 Assistant United States Attorney  
 3 Chief, Criminal Division  
 SHERILYN PEACE GARNETT (Cal. Bar No. 208318)  
 4 Assistant United States Attorney  
 1300 United States Courthouse  
 5 312 North Spring Street  
 Los Angeles, California 90012  
 6 Telephone: (213) 894-3424  
 Facsimile: (213) 894-6436  
 7 E-Mail: [sherilyn.garnett@usdoj.gov](mailto:sherilyn.garnett@usdoj.gov)

8 Attorneys for Plaintiff  
 United States of America

9 UNITED STATES DISTRICT COURT

10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,	)	No. CR 06-391(A)-CBM
	)	
12 Plaintiff,	)	<u>GOVERNMENT'S RESPONSE TO</u>
	)	<u>DEFENDANT STEVEN ERIK PROWLER'S</u>
13 v.	)	<u>OBJECTIONS TO CONDITIONS OF</u>
	)	<u>SUPERVISED RELEASE</u>
14 STEVEN ERIK PROWLER,	)	
	)	Date: April 19, 2010
15 Defendant.	)	Time: 1:30 p.m.
	)	Place: Courtroom of the
16	)	Honorable Consuelo B.
	)	Marshall
17	)	

18 Plaintiff United States of America, by and through its  
 19 counsel of record, the United States Attorney for the Central  
 20 District of California, hereby files the Government's Response  
 21 to Defendant Steven Erik Prowler's Objections to the Conditions  
 22 of Supervised Release.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

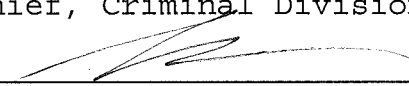
1 The government's response is based on the attached  
2 memorandum of points and authorities, the government's  
3 sentencing position re: sentencing factors, the declaration of  
4 Gary J. Kiernan and exhibits, the record and other filings in  
5 this case, and any argument that the Court may request at the  
6 sentencing hearing.

7 DATED: April 16, 2010

Respectfully submitted,

8 ANDRÉ BIROTTE JR.  
United States Attorney

9 CHRISTINE C. EWELL  
10 Assistant United States Attorney  
Chief, Criminal Division

11   
12 SHERILYN PEACE GARNETT  
Assistant United States Attorney

13 Attorneys for Plaintiff  
14 UNITED STATES OF AMERICA  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 MEMORANDUM OF POINTS AND AUTHORITIES<sup>1</sup>

2 I.

3 INTRODUCTION

4 Defendant has objected to conditions 4 through 7 and 9  
5 through 13 of the United States Probation Office's recommended  
6 supervised conditions. As argued more fully below, however,  
7 these conditions are appropriate, they are reasonably related to  
8 defendant's history and characteristics, and they involve no  
9 greater deprivation of liberty than is reasonably necessary to  
10 achieve the purposes of sentencing.

11 II.

12 ARGUMENT

13 THE COURT SHOULD IMPOSE EACH OF THE SPECIAL CONDITIONS

14 RECOMMENDED BY THE UNITED STATES PROBATION OFFICE

15 District courts have wide discretion in fashioning a  
16 defendant's conditions during supervised release. United States  
17 v. Williams, 356 F.3d 1045, 1052 (9th Cir. 2004); United States  
18 v. Rearden, 349 F.3d 608, 618 (9th Cir. 2003). Supervised  
19 release conditions need not relate to the offense for which the  
20 defendant has been convicted so long as they are "reasonably  
21 related to the goal of deterrence, protection of the public, or  
22 rehabilitation to the offender." United States v. T.M., 330  
23 F.3d 1235, 1240 (9th Cir. 2003). Thus, a court may impose a  
24

---

25 <sup>1</sup>Government counsel apologizes for filing this document  
26 on the Friday before the scheduled sentencing hearing.  
27 Government counsel was under the mistaken belief that a  
28 response to the defendant's objections to supervised release  
had already been filed and did not realize this error until  
April 16, 2010, when reviewing the Clerks' Record for the  
case.

1 special condition of supervised release to the extent that such  
2 condition is reasonably related to the factors set forth in  
3 Title 18, United States Code, Section 3553(a), involves no  
4 greater deprivation of liberty than is reasonably necessary, and  
5 is consistent with any pertinent policy statements issued by the  
6 Sentencing Commission. United States v. Weber, 451 F.3d 552,  
7 558 (9th Cir. 2006).

8 Government's Response Re: Conditions 4 through 7:

9 Defendant argues that conditions 4 through 7 should not be  
10 imposed because the present offenses did not involve a computer.  
11 As stated previously, however, the Ninth Circuit does not  
12 require that supervised release conditions relate to the offense  
13 for which the defendant has been convicted, so long as they are  
14 "reasonably related to the goal of deterrence, protection of the  
15 public, or rehabilitation to the offender." United States v.  
16 T.M., 330 F.3d at 1240.

17 Here, conditions 4 through 7 are reasonably related to the  
18 goals set forth in Section 3553(a) and involve no greater  
19 deprivation of liberty than is reasonably necessary to further  
20 these goals. Defendant's history and characteristics reflect  
21 illegal conduct involving computers and/or computer-related  
22 devices. As defendant's own admissions show, defendant produced  
23 child pornography using the victims of his child exploitation  
24 then caused the child pornography to be distributed to another  
25 child predator using a "scanner." Specifically, in a journal  
26 entry dated February 6, 2005, defendant wrote, ". . . I  
27 voluntarily showed [a fellow child exploiter] some of my porno  
28 shots. I let him take some doubles. He said he'd scan them for

1 himself then return them." Kiernan Decl., ¶ 7(m), Exh. G.  
2 Additionally, defendant viewed child pornography that had been  
3 "encrypted" on another child predator's computer. Specifically,  
4 in a journal entry dated March 14, 2005, defendant wrote:

5 Before dinner, I easily prevailed upon [a fellow  
6 child exploiter] to show me some of his encrypted  
7 color photos of boys, the quality & utter ball-  
8 blasting nature of these pix just blew me away. It  
9 makes my little x-rated B & W collection look like  
10 scanty junk. I just couldn't believe what I saw & it  
11 was the first time ever that I got to see another  
12 B.L.s pix of his own boys. So [the fellow child  
13 exploiter] has seen my photos & now I've seen his.  
14 It was a night at his place that I'll long remember .

15 . . .

16 Kiernan Decl., ¶ 7(n), Exh. G.

17 The aforementioned references demonstrate that defendant  
18 has used computers and/or computer-related devices in the past  
19 to exploit children. Thus, conditions 4 through 7 are  
20 reasonably related to the important goals of deterring defendant  
21 during the period of supervision from reverting to similar  
22 conduct in the future. Specifically, conditions 4 through 7 are  
23 designed to ensure that defendant uses computers and computer-  
24 related devices appropriately and not for accessing,  
25 distributing, or receiving child pornography. Additionally,  
26 condition 6 serves to deter future crimes and provides a  
27 mechanism for the Probation Officer to supervise defendant's  
28 conduct. Neither it nor the other conditions relating to

1 defendant's use of computers and computer-related devices  
2 precludes defendant from using computers and computer-related  
3 devices. Rather, it merely places a limitation on how  
4 such equipment is used. Accordingly, for all of the foregoing  
5 reasons, imposition of conditions 4 through 7 is appropriate in  
6 this case.

7 Government's Response Re: Condition 9:

8 Defendant objects to condition 9, arguing that this  
9 condition is overbroad, violates defendant's Fifth Amendment  
10 rights, and infringes defendant's liberty.<sup>2</sup> Defendant apparently  
11 does not dispute that he would benefit from sex offender  
12 counseling and treatment in general, but he appears to insist on  
13 controlling and deciding his treatment options. The Court  
14 should reject defendant's attempt to dictate the terms of his  
15 sex offender treatment.<sup>3</sup>

16 The nature and circumstances of defendant's offense  
17 demonstrate his sexual desire for children. In such a case, the  
18 treatment professionals, not defendant, should be allowed to  
19 dictate the best course of treatment. See e.g., United States  
20 v. Fellows, 157 F.3d 1197, 1203 (9th Cir. 1998) (upholding  
21 condition that defendant convicted of child pornography  
22 possession participate in sex offender treatment and follow  
23

---

24 <sup>2</sup>The government has no objection to the Court  
25 precluding plethysmograph testing from defendant's sex  
26 offender treatment program.

27 <sup>3</sup>Should it become apparent during the course of  
28 treatment that inpatient treatment is not appropriate, the  
district court retains the discretion to alter the condition  
at that time. See 18 U.S.C. § 3583(e)(2); Fed. R. Crim. P.  
32.1.

1 "lifestyle restrictions or treatment requirements" imposed by  
2 therapists); United States v. Prochner, 417 F.3d 54, 63-64 (1st  
3 Cir. 2005) (affirming imposition of sex offender treatment even  
4 though the "conviction did not involve a sex-related offense and  
5 [defendant had] never been accused of sexual assault" because of  
6 evidence in record suggesting the defendant's desire to have  
7 sexual relationships with minor boys). Because defendant's  
8 participation in a sex offender treatment program is reasonably  
9 related to the purposes of supervised release, defendant's  
10 disagreement about the efficacy of certain treatment options  
11 should not prevent the treatment professional from employing  
12 such tools in fashioning an effective treatment program for  
13 defendant.

14 Further, the Ninth Circuit has already considered and  
15 rejected similar Fifth Amendment and liberty interest challenges  
16 to such a condition, insofar as the condition allows for so-  
17 called "Abel testing" and polygraph testing. See United States  
18 v. Stoterau, 524 F.3d 988, 1003-04 (9th Cir. 2008) (holding that  
19 polygraph testing as a condition of supervised release does not  
20 infringe on a defendant's Fifth Amendment rights because the  
21 defendant continues to retain such rights during the polygraph  
22 examination) cert denied, 129 S. Ct. 957, 173 L. Ed. 2d 153, 77  
23 USLW 3398 (U.S. Jan. 12, 2009) (No. 08-7566); United States v.  
24 Daniels, 541 F.3d 915, 926 (9th Cir. 2008) (rejecting a  
25 defendant's liberty interest challenge to Abel testing because  
26 Abel testing does not implicate a particularly significant  
27 liberty interest) cert denied, 129 S. Ct. 1600, 173 L. Ed. 2d  
28 687, 77 USLW 3505 (U.S. March 9, 2009) (No. 08-8519)).

1 Accordingly, the Court should impose condition 9 as a condition  
2 of defendant's supervised release.

3 Government's Response Re: Condition 10:

4 Defendant objects to condition 10's requirement that he pay  
5 all or part of the cost of mental health treatment. However, an  
6 identical challenge to such a payment condition has already been  
7 considered by the Ninth Circuit and rejected. See United States  
8 v. Soltero, 510 F.3d 858, 864-65 (9th Cir. 2007), cert denied,  
9 129 S. Ct. 35, 172 L. Ed.2d 48, 77 USLW 3198 (U.S. Oct. 6, 2008)  
10 (No. 07-9900). Thus, such a condition is valid.

11 Moreover, defendant's challenge is based on the mistaken  
12 premise that, in imposing this condition, this Court will  
13 delegate the responsibility not only to determine defendant's  
14 ability to pay for treatment, but also to decide whether he  
15 should have to pay for such treatment at all. The proposed  
16 condition unequivocally states, however, that defendant "shall  
17 pay" all or part of the costs; thus, the only issue delegated to  
18 the Probation Officer will be the detail of whether, depending  
19 on ability to pay, defendant will have to pay "all" costs or  
20 only "part of the costs." As such, this is not an improper  
21 delegation of authority to the Probation Officer.

22 Government's Response Re: Condition 11:

23 Defendant argues that condition 11 is overbroad and would  
24 prohibit defendant from possessing adult pornography. However,  
25 in Rearden, the Ninth Circuit rejected a similar overbreadth  
26 argument challenging a substantially similar condition  
27 prohibiting the defendant from possessing "any materials  
28 depicting sexually explicit conduct as defined by 18 U.S.C.



1 § 2256(2)." See Rearden, 349 F.3d at 619. The restriction was  
2 upheld because "[a] defendant's right to free speech may be  
3 abridged to effectively address [his] sexual deviance problem,"  
4 id. (internal quotation marks omitted) (second alteration in  
5 original), and because the restriction furthered the goals of  
6 rehabilitation and protecting the public, id. at 620. See also  
7 Daniels, 541 F.3d at 927 (upholding district court's imposition  
8 of the special condition limiting defendant's possession of  
9 materials depicting sexually explicit conduct, in part, because  
10 the condition furthered the goals of rehabilitating the  
11 defendant and protecting the public). Given defendant's  
12 extensive history of child exploitation, condition 11 is  
13 reasonable, appropriate, and involves no greater deprivation of  
14 liberty than is reasonably necessary to address defendant's  
15 sexual deviance problem. The Court should therefore impose this  
16 condition.

17 Government's Response Re: Condition 12:

18 Defendant argues that condition 12 is overbroad and would  
19 prohibit defendant from possessing his own presentence report.  
20 To address the overbreadth concern for condition 12, the  
21 government proposes that the following language be added to the  
22 end of condition 12, "with the following exceptions: defendant  
23 may possess legal materials (such as statutes, cases, and the  
24 presentence report) necessary for the purposes of bringing a  
25 collateral challenge to his sentence." See United States v.  
26 Cope, 527 F.3d 944, 957-58 (9th Cir. 2008) (suggesting  
27 modifications to address similar overbreadth concern) (cert  
28 denied, 129 S. Ct. 321, 172 L. Ed. 2d 232, 77 USLW 3207 (U.S.

1 Oct. 6, 2008) (No. 08-5912). With this modification, the  
2 government submits that the condition is proper and a reasonable  
3 restriction designed to address defendant's sexual deviance  
4 problems. See Rearden, 349 F.3d at 619.

5 Government's Response Re: Condition 13:

6 Defendant objects to condition 13, arguing that it is a  
7 greater deprivation of liberty that is necessary. However, such  
8 a condition is reasonably related to the goals of specific  
9 deterrence. As the Ninth Circuit reasoned in Stoterau, "The  
10 mail and the Internet are both channels for the transmission of  
11 child pornography" and "[i]t is reasonable to infer that people  
12 may choose to receive mail at non-residential locations when  
13 they are attempting to conceal their identity." Id. at 1008.  
14 Further, this condition does not preclude defendant from  
15 receiving mail. Nor does it preclude him from have a mail box  
16 at his place of residence. Additionally, defendant may still  
17 utilize a post office box with the approval of the United States  
18 Probation Officer. Thus, the condition does not impose a  
19 greater limitation on liberty than is reasonably necessary. See  
20 Id. Accordingly, imposition of condition 13 is both reasonable  
21 and appropriate in this case.

22 III.

23 CONCLUSION

24 For all the foregoing reasons, the government respectfully  
25 requests that the Court impose supervised release conditions 1  
26 through 13 recommended by the United States Probation Office.  
27  
28